The Americans with Disabilities Act: Erosion of Collective Rights?

Erika F. Rottenberg†

INTRODUCTION

For many years, unions and employers have enjoyed a unique relationship that has been legislatively sanctioned and judicially enforced.¹ The Labor Management Relations Act² states that an employer and its certified employee bargaining entity may negotiate an agreement that governs all members of the employee bargaining unit.³ In order to help balance power, maintain industrial peace, and inhibit labor strife, courts

† Erika Rottenberg is an associate with Cooley Godward Castro Huddleson & Tatum specializing in employment and labor law counseling and litigation. Before graduating from Boalt Hall School of Law in May, 1992, she taught Special Education in Anchorage, Alaska. She chaired the Teacher Rights/Grievance Committee and was Chief Negotiator for bargaining the 1989-1992 teachers' contract for the local affiliate of the National Education Association. Additionally, she has been involved with the Council for Exceptional Children and served as President of the New York State Student Council for Exceptional Children.


³ Id. § 159.
have bestowed great deference to rules established by the bargaining entity and the employer.\textsuperscript{4} The bargaining entity—the certified union—is the exclusive representative of all employees.\textsuperscript{5}

In return for the collective protection, power and force of union representation, the individual employee forgoes her individual voice and rights. In fact, the lone worker possesses only limited rights in dealing with her employer.\textsuperscript{6} The lone employee may neither bargain nor create her own agreement or modification of working conditions. Rather, an employee must work through her union, and an employer must consult the union and obtain its consent for any modification of an individual employee's working conditions, terms, or wages.\textsuperscript{7} In return, however, the employee receives protection as well as increased bargaining power from the union, which is derived from the union's exclusive representation of all workplace employees. Should the employer and a lone employee and/or applicant\textsuperscript{8} unilaterally modify a negotiated agreement without union participation, the union may successfully pursue a breach of contract grievance against the employer.\textsuperscript{9}

The passage of the Americans with Disabilities Act\textsuperscript{10} on September 28, 1990 seemingly repudiated this unique relationship in favor of individual rights. The ADA mandates that the lone disabled employee, not her union, craft an employment arrangement with her employer.\textsuperscript{11} If each individual employee negotiates her own arrangement with her employer, then the union's position as the exclusive and collective voice of its members will be drastically undermined in favor of individual representation. As discussed below, however, the ADA need not, nor should it, have such an impact on the voice, representation, and force of collective representation.

This comment offers an examination of the effect that the ADA's reasonable accommodation requirement will have on collective bargaining. It also provides brief recommendations on how unions and employers in the 1990's can successfully respond to the ADA in bridging the gap

\textsuperscript{4} See, e.g., \textit{Vaca}, 386 U.S. at 191.
\textsuperscript{5} 29 U.S.C. § 159(a).
\textsuperscript{6} See, e.g., \textit{NLRB v. Allis-Chalmers Mfg. Co.}, 388 U.S. 175, 180 (upholding union's right to fine and bring suit against members who crossed its picket line during an authorized strike), \textit{reh'g denied}, 389 U.S. 892 (1967).
\textsuperscript{7} 29 U.S.C. § 159(a).
\textsuperscript{8} Because the Americans with Disabilities Act provides protection to both employees and applicants with disabilities, the terms "applicant" and "employee" are used interchangeably in the following discussion.
\textsuperscript{10} Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-12213 (West 1993) [hereinafter ADA or Act].
that disabled workers have long braved, while continuing to maintain the power of collective rights.

I

THE ROLE OF UNIONS AND THE IMPETUS OF THE ADA

The longstanding hallmark of the union in America has been protection of the individual worker. While successful for many workers, unions, as well as the rest of America, failed miserably in protecting people with disabilities. According to a Lou Harris poll, two thirds of all disabled Americans between the ages of sixteen and sixty-four were not working in the late 1980's. Sixty-six percent of working-age disabled persons who were not working said that they would like to have a job. This means that approximately 8.2 million people with disabilities want to work, but cannot find a job. The survey also found that 72% of top managers, 76% of equal opportunity officers, and 80% of department heads or line managers believe that individuals with disabilities often encounter job discrimination from employers, and that discrimination by employers remains an inexcusable barrier to employing people with disabilities.

President Bush signed the ADA into law to address the problem of discrimination against individuals with disabilities. The stated purposes of the ADA are to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities; and to ensure that the federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.

II

EMPLOYMENT PROVISIONS UNDER THE ADA

Title I of the ADA prohibits employers, employment agencies, labor organizations, and joint labor-management committees from discriminating on the basis of disability with respect to application procedures, hiring, advancement, discharge, employee compensation and terms, conditions, and privileges of employment. The ADA mandates that

13. Id.
14. Id.
15. 42 U.S.C.A. § 12101(b).
16. Id.
17. Id.
these entities make reasonable accommodations for disabled employees. It also requires that these entities not discriminate against employees with disabilities when making job decisions, provided that these employees can perform all of the essential job functions.\textsuperscript{18}

The ADA is comparable to other civil rights laws. Employers are not required to hire unqualified persons.\textsuperscript{19} Moreover, the ADA does not oblige employers to give special preference to applicants with disabilities over other applicants on the basis of disability. The ADA merely prohibits discrimination against individuals with disabilities.\textsuperscript{20} The Act is intended simply to ensure that a person's disability will not be an adverse factor in any aspect of the employment process.\textsuperscript{21}

Not only does the ADA prohibit discrimination by employers generally, but it also prohibits discrimination by an employer who is involved in a contractual arrangement or relationship with an organization (e.g. labor union) that discriminates against qualified applicants or employees who happen to be disabled.\textsuperscript{22} In sum, an employer cannot use a collective bargaining agreement to accomplish discriminatory objectives otherwise prohibited by the ADA.\textsuperscript{23}

To illustrate, suppose a collective bargaining agreement contains physical criteria which discriminate against individuals with disabilities. Further, assume that the physical criteria are neither job-related nor consistent with business necessity. These criteria would violate the ADA.\textsuperscript{24} The legislative history of the ADA reflects the congressional intent that employers and those with whom they deal (e.g. unions) do not circumvent the Act's requirements.\textsuperscript{25} A contractual relationship (between a union and an employer) adds no new obligations beyond those imposed by the Act, nor does it reduce obligations.\textsuperscript{26} Thus, while it has been the unions' charge to protect and advocate for individual employees in a collective manner, history shows that unions have failed to do so for employees with disabilities.\textsuperscript{27} As a result, the ADA was enacted to protect the disabled individual. An employer may not, either on its own or by

\begin{itemize}
  \item \textsuperscript{18} Id. § 12112(b)(5)(A).
  \item \textsuperscript{19} 136 CONG. REC. H2438 (daily ed. May 17, 1990) (statement of Mr. Edwards).
  \item \textsuperscript{21} 136 CONG. REC. H2438 (daily ed. May 17, 1990) (statement of Mr. Edwards); see also 42 U.S.C.A. § 12101(b).
  \item \textsuperscript{22} 42 U.S.C.A. § 12112(b)(2).
  \item \textsuperscript{23} 29 C.F.R. § 1630.6; see also H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2 at 59-60 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 341-42.
  \item \textsuperscript{26} Id.
  \item \textsuperscript{27} 42 U.S.C.A. § 12101(a).
\end{itemize}
hiding behind the protective veil of a collective bargaining agreement, treat a disabled and a non-disabled employee dissimilarly, solely on the basis of the disability.\textsuperscript{28}

### III

**The Effect That the "Reasonable Accommodations" Language in the ADA Will Have on Collective Bargaining Agreements: Present and Future**

Under the ADA, a person is qualified for employment if she can perform the essential functions of the job with or without reasonable accommodation.\textsuperscript{29} This obligates the employer to provide reasonable accommodations to a disabled employee, so long as the accommodations do not create an undue hardship on the business' operation.\textsuperscript{30} Under the ADA, the term "reasonable accommodation" includes:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.\textsuperscript{31}

Thus, the ADA requires an employer to make reasonable accommodations so that a disabled employee can perform the essential functions of the job.\textsuperscript{32} It remains unclear, however, what role a collective bargaining agreement commands in determining whether a given accommodation meets the reasonableness standard.\textsuperscript{33} While the above definition provides some guidance, much dispute surrounds the collective bargaining agreement's role.\textsuperscript{34}

Congress recognized that collective bargaining agreements might conflict with the ADA.\textsuperscript{35} For instance, a collective bargaining agreement may reserve certain jobs for employees with a given amount of seniority. If an employee with a disability can only perform those jobs and not others, a conflict arises. Congress stated that the agreement may be considered as a factor in determining whether assigning a disabled employee who lacks the requisite seniority to such a job qualifies as a reasonable accommodation.\textsuperscript{36} Similarly, a collective bargaining agreement should

\textsuperscript{28} \textit{Id.} § 12112(b)(2).
\textsuperscript{29} \textit{Id.} § 12111(8).
\textsuperscript{31} 42 U.S.C.A. § 12111(9).
\textsuperscript{32} \textit{Id.} § 12111(8).
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.}
be one factor in determining whether the agreement’s criteria articulate a legitimate business concern for determining undue hardship. Thus, should a collective bargaining agreement include a description of job duties, that agreement may be a factor in determining whether a given task is an essential function of the job. While recognizing that a collective bargaining agreement should be a factor in determining whether an accommodation is reasonable, Congress neglected to indicate whether the ADA or a provision in a collective bargaining agreement should prevail when they directly contradict one another.

The Equal Employment Opportunity Commission decided to address this issue in a Compliance Manual Section and Policy Guideline, which will allegedly be written and published sometime in the future. Until now, Congress has only commented that future conflict can be avoided by ensuring that collective bargaining agreements negotiated after the effective date of the ADA contain a provision permitting the employer to take all actions necessary to comply with this legislation. That statement blatantly ignores current collective bargaining agreements and fails to recognize the real probability that a union and employer will fail to agree on such a sweeping clause that enables the employer to take all actions it deems necessary to comply with this legislation.

IV
POTENTIAL CONFLICTS BETWEEN THE ADA AND COLLECTIVE BARGAINING AGREEMENTS

The ADA delineates reassignment, job-restructuring, and modified work schedules as examples of reasonable accommodations an employer may undertake in hiring an employee with a disability. These are also the areas where a collective bargaining agreement and the ADA are likely to conflict. Since much of the ADA is premised on section 504 of the Vocational Rehabilitation Act, section 504 is helpful in demystifying the role of the collective bargaining agreement in the context of the ADA.

A. Reassignment and Reasonable Accommodations Under the ADA

The language of section 504 fails to illuminate the relationship between section 504 and collective bargaining agreements. For instance, courts interpreting section 504 have held that the duty to reassign is not a

37. Id.
38. Id.
39. Id.
reasonable accommodation. In *Carter v. Tisch*, the court found that where a collective bargaining agreement reserved permanent light-duty assignments for employees with five or more years' seniority, the duty to provide a reasonable accommodation did not include requiring an employer to reassign an employee with a disability to a light-duty position. The court based its decision on a finding that the collective bargaining agreement trumped the reasonable accommodation requirement and the duty to reassign.

Although the ADA is premised upon section 504, a major distinction arises between them in interpreting the reasonable accommodation requirement as it relates to employee reassignments. The ADA, unlike section 504, explicitly recognizes reassignment as a reasonable accommodation. This reassignment right potentially results in a drastic diminishment of the union's highly sought-after seniority protections and benefits. However, lest an employer utilize this ADA provision as an excuse to completely ignore a collective bargaining agreement provision, Congress explained that the ADA's use of the term "reassignment" involves transferring an employee to a vacant position; bumping another employee out of a position to create a vacancy *is not required*. Consequently, although a reassignment may be a reasonable accommodation, the union can aptly protect its agreement and seniority benefits because a qualified employee cannot bump an incumbent.

For example, suppose a collective bargaining agreement states that vacancies are to be filled on a seniority basis and two employees apply for a single vacancy, one of whom happens to be disabled. What happens when a "senior" employee applies for the position, but a less "senior" employee, with a disability, also applies for that same position? The answer is not readily apparent. A conflict between the ADA and the collective bargaining agreement surfaces. The union will argue that the seniority bidding process is the correct mechanism for filling the vacancy, since the Act's legislative history precludes bumping. However, both the disabled employee and the employer may argue that bumping occurs only if the position is occupied. Bumping, in other words, does not occur

42. 822 F.2d 465 (4th Cir. 1987).
44. See 42 U.S.C.A. § 12111(9)(B).
if an employee is blocked from obtaining a position. The disabled employee and the employer may argue that if a vacancy exists, even if there are qualified “senior” applicants, the reasonable accommodation language entitles the person with a disability to fill the position. This argument, however, is faulty.

Congress could have provided preferential treatment to disabled people under the ADA, but it chose not to do so. Given that the reasonable accommodation language does not require bumping, the courts should adopt the unions' position that where a collective bargaining agreement provides for the filling of positions by seniority, the “no bumping” provision of the ADA prevents a disabled employee from receiving an advantage via bumping. The employer is not required to “bump” another employee from a position in order to create a vacancy. This same rationale applies to not “bumping” a person entitled to a vacancy under a collective bargaining agreement. If the disabled individual receives the position over a more senior employee, the latter would essentially be “bumped” from her slot, which is protected under the collective bargaining agreement. After all, the ADA does not oblige the employer to affirmatively act to favor a disabled employee; rather, it only prevents discrimination based on a disability. The employer would violate the collective bargaining agreement by giving the advantage to the disabled employee in contravention of that agreement. Thus, as long as the seniority language in the collective bargaining agreement is non-discriminatory, the reassignment provision of § 12111(9)(B) is effective only when a true vacancy exists—one with no “senior” applicants. Not only will this interpretation effectuate the intent of the ADA and comport with legislative history, it will limit the occurrence of potential conflicts between collective bargaining agreements and the ADA in the reassignment process.

B. Job Restructuring and Work Schedule Modifications
Under the ADA

Conflicts between the ADA and collective bargaining agreements will likely also arise in the areas of job restructuring and part-time or modified work schedules. Where collective bargaining agreements provide job descriptions and the delineation of work times, modifications arranged by the individual employee and employer are likely to conflict with the collectively bargained rights of others. In these circumstances, if the employer yields to the ADA, it will face a grievance from the union

48. See supra notes 19-21 and accompanying text.
49. A collective bargaining agreement which includes discriminatory language violates the ADA. See 42 U.S.C.A. § 12112(b)(2); 29 C.F.R. § 1630.6 (1992).
for breach of contract. Should the employer yield to the collective bargaining agreement, it will face a discrimination suit from the disabled employee for violating the ADA.

Unlike section 504, which does not require federal employers to make accommodations for disabled employees that would contravene the provisions of an otherwise applicable collective bargaining agreement, the ADA states that a collective bargaining agreement will not serve as a defense to an employer who fails to accommodate a disabled employee.\textsuperscript{50} Rather, the collective bargaining agreement is merely one factor in determining the reasonableness of an accommodation.\textsuperscript{51} On the other hand, the ADA should in no way serve as an excuse for the employer to undermine a collective bargaining agreement.

The optimal solution for the employer and the employee with a disability is to choose an accommodation that conforms with the collective bargaining agreement. For example, if two or more modifications exist which would enable the employee to perform the essential job functions, and only one would conflict with the collective bargaining agreement, the employer should select the modification that does not conflict with the agreement. If the employer chooses the modification that does conflict, then damages should be available to the union for breach of the collective bargaining agreement. Just as a collective bargaining agreement is not an excuse to violate the ADA, the ADA cannot serve as an excuse to circumvent a collective bargaining agreement and sabotage a union’s collective representation.

If the sole available accommodation conflicts with the collective bargaining agreement, a fastidious problem surfaces. The ADA obliges the employer to consider the collective bargaining agreement in determining whether a given accommodation is reasonable. Hence, the employer should approach the union and attempt to craft an agreement modifying the applicable portion of the collective bargaining agreement to accommodate the employee with a disability. The employer should not endeavor to impose widespread changes or vastly overhaul the collective bargaining agreement. Instead, the employer should limit its sights to a modification that is narrowly tailored in order to accommodate an individual employee in a single instance. A memorandum of understanding may be the appropriate mechanism for accomplishing this.\textsuperscript{52} While unions may argue that this approach undermines the effectiveness of collec-

\textsuperscript{50} See 42 U.S.C.A. § 12113(a) (naming defenses to an action under the Act); see also S. REP. No. 116, 101st Cong., 1st Sess. 32 (1990) (explaining legislative intent on this issue).


\textsuperscript{52} A memorandum of understanding is an agreement between a union and an employer modifying an existing contract provision or adding a contract provision to an already existing collective bargaining agreement. Generally, the memorandum of understanding covers a small issue or a small number of people, and is binding upon both the employer and the union.
tive bargaining agreements, the argument is unpersuasive. Minor modifications to collective bargaining agreements are often jointly made by employers and unions. Such minor adjustments are a small inconvenience in achieving the goal of including individuals with disabilities in today's workforce.\footnote{Note that should the job restructuring or work-schedule modification "bump" a current employee, it would be disallowed under the reassignment limitation discussed supra at notes 42-49 and accompanying text.}

Another avenue a disabled employee may wish to pursue when an accommodation conflicts with the collective bargaining agreement is to determine whether that agreement is discriminatory. If the collective bargaining agreement is discriminatory, it violates the ADA and is invalid.\footnote{42 U.S.C.A. § 12111(b)(9).} Here, more than likely, the collective bargaining agreement will include a "conformity to law" clause that requires the union and the employer to return to the table and negotiate a provision that comports with federal law.\footnote{A typical conformity to law clause is: If any provision of this Agreement is held to be contrary to law by a court of competent jurisdiction, such provision will not be deemed valid or enforceable, except to the extent permitted by law, but all other provisions will continue in full force and effect. The parties to this Agreement will meet not later than ten days following such holding and shall make every good faith effort to re-negotiate the original intent within the parameters established by law.}

**CONCLUSION**

The ADA is not self-executing. In and of itself, The ADA will not change the imbedded perceptions which have caused discrimination against forty-three million disabled Americans. Rather, the ADA is a first step toward the elimination of barriers which have kept Americans with disabilities from fully participating in society. Labor and management should join hands with disabled Americans—prospective employees and union members—to embark upon the fulfillment of the vision that all citizens are equally entitled to fair and reasonable employment, compensatory packages, and promotion opportunities.

By working coactively and in good faith, the union and employer can minimize instances of true conflict between the ADA and a collective bargaining agreement. Unions and employers should be encouraged to provide as many opportunities as possible for individuals with disabilities to be fully included in all aspects of the workplace. For instance, although the ADA stops short of requiring an employer to give preference to a disabled employee seeking a reassignment, a union and employer could, and perhaps should, agree to do so in their collective bargaining agreement. At a minimum, future bargaining agreements must be negotiated with the ADA in the forefront of negotiators' minds.
When the provisions of a collective bargaining agreement differ from the ADA and a conflict arises, the employer should pursue the course of action that does not conflict with the collective bargaining agreement. If conflict is unavoidable, the union and employer must commit to sitting at the table and negotiating the solution the ADA has prescribed: nondiscriminatory employment opportunities for people with disabilities. Such a solution should be narrowly drawn and included in a memorandum of understanding to safeguard the integrity of the collective bargaining agreement. Where the union and employer work together, a stronger union membership and an efficient and productive workplace environment will ensue. The collective rights of the union need not be undermined.